Nos. 14503-14504

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOW CHU YUN, on behalf of JOW MUN YOW,

Appellant,

vs.

BRUCE G. BARBER, District Director, Immigration and Naturalization Service,

Appellee.

JOW CHU YUN, on behalf of JOW KWONG YEONG,

Appellant,

vs.

BRUCE G. BARBER, District Director, Immigration and Naturalization Service,

Appellee.

Appeals From the United States District Court for the Northern District of California, Southern Division.

APPELLANTS' OPENING BRIEF.

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APPELLANTS' OPENING BRIEF.

Introduction.

These two appeals are prosecuted upon a single record, pursuant to stipulation [Tr. p. 15]. In addition to the printed record, appellants have requested that there be brought before this Court the transcript of testimony before the Board of Special Inquiry of the Immigration Department which was introduced in the Trial Court by reference [Tr. p. 32].

The Jurisdiction of This Court.

Appellants filed in the District Court petitions for writs of habeas corpus alleging therein that they were citizens of the United States in that their father was a citizen of the United States. Their petitions further alleged that they were admitted into the United States on or about October 21, 1951, at San Francisco, California, and that they carried with them for presentation to the Immigration and Naturalization Service a Consular Travel Affidavit, accompanied by a travel authorization stamp duly signed and sealed by Vice Consul James T. Rousseau at Hong Kong, British Crown Colony, the petitions further allege that after proceedings held before a Board of Special Inquiry of the Immigration Service, an order was made to the effect that petitioners had not satisfactorily established their identity and that an order for exclusion was made. The District Court granted the writ of habeas corpus in each case [Tr. p. 10] and after hearing thereon, made its order vacatng the writs of habeas corpus and dismissing the petitioners [Tr. p. 12.] It is from these orders that the present appeals are prosecuted.

The jurisdiction of this Court is provided for by Section 2253 of Title 23 of the United States Code.

Facts.

The petitioner in these two proceedings, Jow Chu Yun, is an American citizen of Chinese origin. His citizenship has been admitted [Tr. p. 9]. The petitions allege that Jow Mun Yow and Jow Kwong Yeong are the sons of petitioner Jow Chu Yun. It is also admitted by the pleadings that if it were established that the latter two individuals are the sons of the petitioner then they are citi-

zens of the United States and are entitled to admission into the United States.

As above indicated, the two young men, who are respectively 19 and 20 years of age, presented themselves at San Francisco on October 21, 1951, with a Consular Traveler Affidavit and a travel authorization stamp issued by the American Vice Consul at Hong Kong. Proceedings were had before the Board of Special Inquiry of the Immigration and Naturalization Service to determine the identity of the young men as sons of an admittedly American citizen, the petitioner in these proceedings, and the Board held that identification had not been established and a final order was made on December 7, 1951, by the Board of Immigration Appeals, affirming the findings of the Board of Special Inquiry.

The proceedings before the Board of Special Inquiry reveal the following admitted facts:

(a) That the petitioner herein is an American citizen [Tr. p. 9];

(b) That the petitioner was in China between November, 1930, and September, 1932, making it possible for him to have been the fatehr of the two boys in question [Tr., Board of Special Inquiry, p. 4];

(c) Petitioner was advised of the whereabouts of his children in China and constantly received letters from his wife during her lifetime and from his sons [Tr., Board of Special Inquiry, p. 10];

(d) Petitioner constantly contributed to the support of his wife and family during their residence in China [Tr., Board of Special Inquiry, p. 11].

In addition to lodging the Transcript of the Board of Special Inquiry of the Immigration and Naturalization Service [Tr. p. 17], there was offered a blood typing test made in San Francisco [Tr. p. 18] which led to the conclusion and opinion of the doctor who made the test that one of the boys was excluded by the test from being the son of petitioner and the other was in the class who could be the son of petitioner. Petitioners also had the Court examine the physical characteristics of petitioner and the two sons [Tr. p. 20].

There is no contrary evidence in the record. There are some conflicts in the record as to the places where the two young men were visited in China by their uncles in the year 1947. Considering the youthfulness of the boys, it can hardly be said that these discrepancies as to places visited in 1947 would create any real conflict in the record or any basis for contrary inferences to the direct testimony of both the petitioner and his two sons.

Legal Issues.

We find ourselves in a legal dilemma. This is not a proceeding under Section 903 of Title 8, United States Code Annotated, which permitted declaratory relief in similar cases. The effect of the McCarran Act was to abrogate and repeal this Section. It is our considered view that we are entitled to the same type of review on habeas corpus that we would have been entitled to under Section 903 of the prior Immigration Law. The Congressional debates indicated that the McCarran Act was a mere codification of the laws relating to immigration and

did not divest anyone claiming American citizenship from any substantial right that he was entitled to under prior law. An examination of Section 1503 of the United States Code Annotated indicates that Congressional debate and Congressional action do not coincide, for in Section 1503 it is provided that judicial review is not available in the case of an exclusion order. We are dealing here, of course, with an exclusion order.

Florentine v. Landon, 206 F. 2d 870, is of little help to either side in this case. That decision merely held that habeas corpus was available where a question of citizenship was involved, but could not be invoked until all administrative processes had been exhausted. It is obvious in this case that administrative remedies had been thoroughly exhausted.

We are concerned as to the nature of the review permitted under the McCarran Act in a habeas corpus proceeding of this nature. Will the weight and sufficiency of the evidence before the Board of Special Inquiry be reviewed or will merely the question of due process of law before that administrative body be reviewed? While this is an important legal question, we do not believe that it is of paramount importance in this matter. In view of the fact that the record in this case contains no contradictory evidence, it is our view that the proceedings before the Board of Special Inquiry of the Immigration and Naturalization Service were arbitrary and capricious and that the findings of fact are entirely contrary to the evidence.

Quantum of Proof.

We are immediately confronted with the question as to the extent that the burden of proof is cast upon petitioners in a case of this kind. We believe that the recent decision of this Court in case No. 13808, decided August 18, 1954, entitled, *Ly Shew v. Dulles,* establishes the correct rule on the burden of proof. We, of course, are not unmindful of the fact that the case arose under the old Section 903 of the Immigration Law of 1940, but we feel that the reasoning in that case is definitely applicable to the facts in the cases here at bar. We believe that the conflict found by the Board of Special Inquiry was unfairly brought about in attempting to pin-point a meeting in 1947, between the young men and their uncles in a place in China, known as Macao. The questions did not relate as to whether the boys had seen the uncles, but it was purely and simply limited to Macao. It appears in the testimony of one of the young men that he was asked the question as to whether he had seen the uncle and he forthrightly testified that he had seen him twice, once in China and then at the airport in San Francisco [Tr., Board of Special Inquiry, p. 53]. We cannot conceive that this Court will find that there was, in effect, contradictory evidence as to the relationship between petitioner father and the two sons, based upon this type of discrediting testimony, and a fair review of the record will indicate that the identity of the two young men and the petitioner was satisfactorily established without any conflicting testimony. We are certainly brought clearly within the language of the decision of this Court in the case of *Ly Shew v. Dulles,* No. 13808, where it appears that the main difficulty with these cases is the large number of them that are pending in the Northern District of California.

Review Not Limited to Merely Formalism of Inquiry.

The leading case on the right of one seeking admission into the United States is *Quon Poy v. Johnson,* 273 U. S. 352, which held, in effect, that habeas corpus would only review the actions of the administrative body to determine whether the Board held a fair inquiry or whether it acted unlawfully or abused its discretion. It is our feeling that in this case the action of the Board was arbitrary and capricious in deciding against uncontradicted testimony.

However, we do not believe that either the District Court or this Court is limited to a mere determination of the formalism of the proceedings before the Board of Special Inquiry, but may examine into the weight and sufficiency of the evidence as it is entitled to do in a deportation matter. We, of course, are at a loss to know exactly what grounds were relied upon by the District Court for its orders do not indicate its reasons.

In this case, it is admitted that the two young men were admitted to the United States under bond. In such event, regardless of the method of entry, upon habeas corpus, the matter must be treated as a deportation matter, giving the right to a full hearing in the United States District Court.

Shaughnessy v. Mezei, 345 U. S. 206;

Conn v. Gottlieb, 265 U. S. 310;

Heikkila v. Barber, 345 U. S. 229;

Rubinstein v. Brownell, 206 F. 2d 449;

Hughes v. Tropello, 296 Fed. 307;

United States ex rel. Vajka v. Watkins, 179 F. 2d 137.

Novelty of the Problem.

We sincerely believe that this is the first case of its kind to arise since the enactment of the McCarran Act. We would be on solid ground were this a proceeding under Section 903 of the Immigration and Nationality Act of 1940, and we feel that were the rules in effect under that statute applied, there would be no question but that the two young men here involved would be declared to be American citizens. We fail to know exactly how to apply the law to this situation in view of the provisions of Section 1503 of the McCarran Act. We, of course, believe that there are several cases that have been decided since the effective date of the McCarran Act that are helpful to the position here urged.

We may start out with the thesis expressed in *Kwock Jan Fat v. White,* 253 U. S. 454, in which the Supreme Court of the United States said:

> "It is better that many Chinese immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from his country."

This Court had before it almost the identical factual situation as we have here at bar in the case of *Mar Gong v. Brownell,* 209 F. 2d 448. The only difference between that case and those at bar is that the *Mar Gong* case was a proceeding brought under Section 903 of the Immigration and Naturalization Act of 1940. This Court had before it a record from the Immigration Service very similar to the one here involved and this Court had no difficulty in striking down the apparent discrepancies and at page 451 stated:

> "In view of the multitude of details about which inquiry was made, we doubt if any honest witness of

> average intelligence could survive as exhaustive an examination as this and disclose fewer discrepancies in his testimony."

We also feel that in the cases at bar, we have the added difficulty of having used interpreters, which, of course, makes it more difficult to reconcile the answers given by Chinese. We, again, assert that the major difficulty that appellants have to overcome in this case lies in the fact that they are Chinese. It is our position that if they are American citizens, it matters not that they are Chinese and if this is their country, there should be no question of their right to live and dwell in this country and not be deported and excluded to have to suffer the rigors that will be forced upon them when they return to Red China.

Rubinstein v. Brownell, 206 F. 2d 449, is an interesting case in that it definitely suggests, at page 452, that the scope of habeas corpus may be broader than its generally recognized limited application. It is our view that in the cases at bar, we are entitled to judicial review and as we indicated, it is our belief that if the principles of judicial review are applied, that these two boys must remain in the United States as citizens.

Conclusion.

We, in a sense, apologize to this Court for being unable to shed as much legal light on the problem involved that we would like to. We are limited because we have been unable to find any helpful case law as the McCarran Act is relatively new on our statute books. We feel, however, that a review of the entire record will indicate that a substantial injustice is being done to these two young men and that the record before the Court indicates that they are the sons of petitioner and should be permitted to re-

main in the United States on some legal theory. It may be that habeas corpus is a substitute for Section 903 of the old statute. That is a problem which this Court will have to determine.

We respectfully submit that the orders and decrees of the District Court should be reversed and this Court should order that the writs heretofore be issued remain in full force and effect and that the two young men should be given their liberty in the United States.

Respectfully submitted,

BERTRAM H. ROSS,

Attorney for Appellants.